

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 275 of 1983

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DAVE & UPADHYAY & CO.

THROUGH LAXMISHANKAR GANESH

Versus

SONABEN PITHABHAI WIDOW OF DECEASED PITHABHAI PRABHATBHAI

Appearance:

MR JD AJMERA for Petitioners

MR PV HATHI with MR GAURANG H BHATT for Respondent No. 1, 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 17/12/97

ORAL JUDGEMENT

This petition arises out of the judgment and order dated 1st January, 1983 passed by the appellate authority under the Gujarat Rural Debtors' Relief Act, 1976.

The facts leading to the present petition are as

under:

The respondent herein one Pithabhai Parbatbhai was a Barkhalidar of three pieces of lands situated at village Bavli of Taluka Dhrangadhra, District Surendranagar. The said three pieces of lands were mortgaged to one Annapurnaben in the year 1947 and since then, said Annapurnaben was cultivating the lands. It appears that the said mortgage of the land was executed for a sum of Rs.700/-. Said Annapurnaben entered into a partnership with her brother Shivshankar and these pieces of lands were thrown in the stock of the partnership. Since then, the said partnership firm, petitioner no.1-Company was cultivating the said lands.

The Saurashtra Barkhali Abolition Act, 1951 (hereinafter referred to as "the Act") was enacted to provide for certain measures for the abolition of barkhali tenure in Saurashtra and became effective from 1st September 1951. Section 2(i) thereof defines the term "Barkhalidar" to be a person who holds a tenure as Barkhalidar, Jivayatdar, Chakariat, Kherati or Dharamada. Section 2(iv) defines "tenant" to be an agriculturist who holds the land on lease from Barkhalidar or a person claiming through him and includes person who is deemed to be a tenant under the provisions of the Act. Section 4(1) thereof provides that "any person who is lawfully cultivating any land belonging to Barkhalidar shall, for the purpose of this Act, be deemed to be his tenant." Proviso thereto excludes inter alia, the mortgagee in possession from the definition of the words "deemed to be a tenant." The explanation provides that "a person who is otherwise deemed to be a tenant shall not cease to be a tenant only on the ground that he is also a mortgagee in possession." Section 5 thereof provides that on the commencement of the Act, all rights, title and interest of all the Barkhalidars in agricultural lands comprised in Barkhali Estate shall cease and be vested in the State of Bombay [substituted by the words "the State of Gujarat" by the Gujarat Adoption of Laws (State and concurrent subjects) Order, 1960] from all encumbrances, subject to the provisions of the Act. Section 6 thereof empowers all Barkhalidars to apply to the Mamlatdar for allotment of land to him for personal cultivation. Section 7 thereof provides for the procedure to be followed by the Mamlatdar upon receipt of any application under Section 6 of the Act. Section 8 thereof provides for the manner in which the allotment can be made to the Barkhalidar for personal cultivation. Section 8(2)(a) provides, inter alia, that the Barkhalidar in respect of land allotted to him and the tenant in respect of the

land allowed to remain in his possession shall have a mutual right of pre-emption for ten years by lease or sale at the price to be determined by the Mamlatdar. Section 10 thereof empowers a tenant to apply in the prescribed form to the Mamlatdar for acquiring rights in respect of his holding. Section 11 provides for the procedure to be followed by the Mamlatdar and Section 12 provides for the manner in which the occupancy certificate to a tenant can be issued.

It appears that on commencement of the Act, the petitioner no.1-Company made an application under Section 10 of the Act to the Mamlatdar for acquiring rights in respect of its holding and the respondent no.1 Barkhalidar made an application under Section 8 of the Act for allotment of land for personal cultivation. The said applications were disposed of by the then Mamlatdar, on 7th December 1954. Two pieces of lands bearing Survey Nos. 198 and 76, admeasuring 8 acres-28 gunthas and 2 acres-15 gunthas respectively, were granted to the petitioner no.1-Company and a piece of land bearing Survey No.152/1 admeasuring 5 acres-37 gunthas was allotted to the Barkhalidar - respondent no.1. Pursuant to the said order, an occupancy certificate was issued in favour of the petitioner no.1-Company, on 4th August 1955. It appears that on 8th November 1964, i.e. within 10 years of the allotment of the lands, the pieces of lands granted to the petitioner no.1-Company were sold by it to the petitioners nos.2 to 5. Thereafter, in the year 1976, i.e. on 15th August 1976, the Gujarat Rural Debtors' Relief Act, 1976 was introduced. The respondent no.1-Barkhalidar made an application under the said Act and claimed that his lands were mortgaged to the present petitioner no.1-Company and that the same may be discharged from the said mortgage. The Debt Settlement Officer, under his judgment and order dated 29th September, 1981 upheld the claim of the debtor and held that the debtor was a small farmer and had mortgaged the said pieces of lands for Rs.700/-. The Debt Settlement Officer, however, took the view that the land admeasuring 8 acres-28 gunthas was sold by the petitioner no.1-Company with the consent of the respondent no.1. The Debt Settlement Officer, therefore, made the order of discharge in respect of the land bearing Survey No. 465 (new Survey Number) admeasuring 2 acres-26 gunthas of land. I am informed that, pursuant to the said order, the possession of the said land has been handed over to the respondent no.1. The above referred order dated 29th September 1981 was challenged by the respondent no.1 before the appellate authority. The appellate authority allowed the same on 1st January 1983. Feeling aggrieved,

the petitioners have preferred this petition.

The Saurashtra Agricultural Debtors' Relief Act, 1954 (hereinafter referred to as 'the Act of 1954) was introduced on 5th August, 1954. The respondent no.1 Barkhalidar approached the competent authority under the Act of 1954, i.e. the Court of Civil Judge, (J.D.), Debt Relief Board, Dhrangadhra (hereinafter referred to as 'the Board'). The said application was allowed by the Board on 23rd July, 1955. The claim made by the respondent no.1 of being a debtor was upheld and the two pieces of lands retained by the petitioner no.1-Company were discharged from the alleged mortgage. Feeling aggrieved by the above referred judgment and order dated 23rd July 1955, one of the partners of the petitioner no.1-Company, i.e. Shivshankar Upadhyaya preferred an application for review being Miscellaneous Application No.2 of 1956. The said application was allowed on 22nd August 1956. The earlier order dated 23rd July 1955 in respect of the above referred two pieces of lands was set aside. The said order dated 22nd August 1956 was not challenged further and has become final.

Mr.Ajmera, the learned Advocate appearing for the petitioners has contended that, both the authorities below have erred in holding that the allotment of the land made to the petitioner no.1-Company was bad and illegal and the occupancy certificate issued under the Act in favour of the petitioner no.1-Company was a nullity. Both the authorities below have held that the petitioner no.1-Company was a mortgagee in possession and the same could not have been said to be a tenant within the meaning of Section 2(iv) of the Act or a deemed tenant under Section 4 of the Act. The said order, therefore, being illegal was null and void and could not have been relied upon. Mr. Ajmera has submitted that, whether rightly or wrongly the petitioner no.1-Company had been permitted to retain the above referred two pieces of lands under Section 10 of the Act which order had become final. He has submitted that neither the Debt Settlement Officer nor the appellate authority constituted under the Gujarat Rural Debtors' Relief Act, 1976 had power or jurisdiction to question the correctness of the order made in favour of the petitioner no.1-Company as far back as on 7th December, 1954 which had become final. He has further submitted that, both the authorities below relied upon the judgment and order of the Board, passed on 23rd July, 1955. Both the Courts have held that in view of the order dated 23rd July 1955, the occupancy certificate issued in favour of the

petitioner no.-1 Company on 4th August, 1955 was null and void. Mr. Ajmera has submitted that the order under Section 10 of the Act had been made earlier, i.e. on 7th December, 1954 and issuance of the occupancy certificate was a mere consequence. He has further submitted that the respondent no.1 suppressed the factum of the order made on Miscellaneous Application No.2 of 1956 from both the authorities below. He has, therefore, submitted that the orders made by both the authorities below are nullity and require to be quashed and set aside.

Mr.Hathi, the learned Counsel has appeared along with Mr.Bhatt, the learned Advocate for the respondent no.1. He has submitted that the petitioner no.1-Company was never a tenant of respondent no.1-Barkhalidar. The lands were originally mortgaged to Annapurnaben who formed a partnership with her brother in the name of the petitioner no.1-Company and cultivated the lands and the same cannot be said to be a tenant. He has relied upon the definition of the word "tenant" given in Section 2(iv) of the Act and the "deemed tenant" given in Section 4 of the Act. He has submitted that, neither Annapurnaben nor the petitioner no.1-Company was a tenant of the respondent no.1. In view of the provisions contained in Section 4 of the Act, none of them can be said to be a deemed tenant either. The petitioner no.1-Company, however, suppressed this fact from the competent authority and obtained occupancy certificate under Section 12 of the Act. He has, therefore, submitted that the order obtained by the suppression of material facts is a nullity and cannot be relied upon. He has further submitted that the order made by the Board, on Miscellaneous Application No. 2 of 1956 has not been brought on the records of the matter and cannot be relied upon. He has also submitted that powers of this Court under Article 227 of the Constitution of India are limited and the Court cannot go into the finding of facts recorded by the lower authorities. In support of his contention, he has relied upon the judgments of the Supreme Court in the matter of VENKATLAL G. PITTIE AND ANR., v. M/S. BRIGHT BROS. (PVT) LTD., (AIR 1987 S.C. 1939) and of GOWRISHANKAR AND ANR., v. JOSHI AMBA SHANKAR FAMILY TRUST AND ORS., (JT 1996 (2) S.C. 560). Mr.Hathi next contended that the Debt Settlement Officer under his order dated 29th September, 1981 has rightly held that the order dated 7th December, 1954 and the occupancy certificate obtained by the petitioner no.1-Company was a nullity. The said order has not been challenged by the petitioners and the same has, therefore, become final. It is, therefore, not open to the petitioners to challenge the identical finding

recorded by the appellate authority in the appeal preferred by the respondent no.1.

It is true that the petitioners have not produced the above referred judgment and order passed on Miscellaneous Application No.2 of 1956, however, in the interest of justice, Mr. Ajmera is permitted to produce the same on the records of this petition. In the matter of VENKATLAL G. PITTIE (*supra*), the Supreme Court held that, "if a proper Court has come to the conclusion on the examination of the nature of the structure, the nature of the duration of structure the annexation and other relevant factors that the structures erected by the tenant on the demised premises were permanent in nature which were violative of S. 13(1)(b) of the Rent Act as well as S. 108, Cl.(p) of the Transfer of Property Act and such a finding, is possible, it cannot be considered to be perverse. In such a situation, the High Court cannot interfere with the finding of Court under Art. 227. The mere fact that a different view could have been taken by the trial Court and appellate Bench of Court of Small Causes, would be no ground to interfere with the findings by the High Court". In my view, the above referred observations do not affect the merits of the present petition. In the present petition, the Court is not called upon to answer whether the finding recorded by the lower authorities is correct or not. The only question is whether the lower authorities were right in questioning the correctness of the order of allotment made under the Act. The above referred judgment, therefore, has no applicability on the facts of the present case. In the matter of GOWRISHANKAR AND ANR., (*supra*), the Supreme Court held that, the trustees obtained the permission to sell the property to the purchasers practising fraud upon the Court. Relying upon the earlier judgment of the Supreme Court in the matter of S.P.CHENGALVARAYA NAIDU ((1994) 1 S.C.C. 1), the Court observed that, "It is settled proposition of law that, a judgment or decree obtained by playing fraud on the Court is a nullity and honest in the eyes of law. Such a judgment or decree by the first Court or by the highest Court has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings." In my view, the above referred observations made by the Supreme Court shall not help the respondent no.1. The order of the competent authority made under Section 10 of the Act was never a subject-matter of challenge before any Court and the proceedings under the Gujarat Rural Debtors' Relief Act, 1976 cannot be said to be a collateral proceeding in which the correctness of it

could have been challenged. The authorities functioning under the Act cannot be said to be a Court whether superior or inferior. However, in my view, the respondent no.1 obtained the orders of the Debt Settlement Officer and the appellate authority by suppressing the order made on Miscellaneous Application No.2 of 1956. Both the authorities below have solely relied upon the judgment and order passed on 23rd July, 1955 in coming to a conclusion that the order made under Section 10 of the Act was a nullity. The said order dated 23rd July 1955 was subsequently set aside in above referred Miscellaneous Application, on 22nd August, 1956. In my view, therefore, both the authorities below have erred in holding that the allocation of lands to the petitioner no.1-Company under Section 10 of the Act was bad and illegal and the petitioner no.1-Company continued to be a mortgagee in possession and the respondent no.1 continued to be a debtor. Besides there is no sufficient material on the records to hold that the petitioner no.1-Company was not a deemed tenant under Section 4 of the Act.

In my view, on commencement of the Act on 1st September 1951, all rights, title and interest on the Barkhali lands either of the petitioner no.1-Company or the respondent no.1 Barkhalidar stood abolished. The lands vested in the State Government free from all encumbrances. The competent authority under power vested in it, under Section 10 of the Act, allotted the said Barkhali lands to the petitioner no.1-Company and the respondent no.1 Barkhalidar as aforesaid. Both of them thus became exclusive occupier of the lands and no relationship of debtor and creditor between the petitioner no.1-Company and the respondent no.1-Barkhalidar exists since then. The application under the Gujarat Rural Debtors' Relief Act, 1976 made by the respondent no.1, therefore, was misconceived and required to be rejected.

In view of the above discussion, the judgment and order of the appellate authority (Annexure.B to the petition) is quashed and set aside. The judgment and order of the Debt Settlement Officer, at Annexure.A to the petition was not challenged further by the petitioners herein and, therefore, the same has become final in respect of the piece of land bearing Survey No. 465, admeasuring 2 acres-26 gunthas. The order of the Debt Settlement Officer in respect of the said piece of land bearing Survey No.465 is, therefore, not disturbed. The petition is allowed to the aforesaid extent only. Rule is made absolute. The respondent no.1 shall bear

the cost of this petition.

Mr. Bhatt, the learned Advocate appearing for the respondents states that, earlier this petition was dismissed in favour of the respondents by this Court under its judgment and order dated 10th October, 1994 which was quashed and set aside under order dated 22nd February, 1995, made on Miscellaneous Civil Application No. 96 of 1995. However, in view of the statement made before the Court on 10th October 1994, the respondents have deposited a sum of Rs.700/(being the amount of loan borrowed by the respondent no.1) with the Debt Settlement Officer. If that be so, the respondents will be at liberty to withdraw the said amount.

Sreeram.